

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

ALEXSAM, INC., <i>Plaintiff,</i> v. BEST BUY STORES L.P., <i>Defendants.</i>	§ § § § § § § § § §	Case No. 2:13-cv-0002-MHS-CMC
ALEXSAM, INC., <i>Plaintiff,</i> v. BARNES & NOBLE, INC. AND BARNES & NOBLE MARKETING SERVICES CORP., <i>Defendants.</i>	§ § § § § § § § § §	Case No. 2:13-cv-0003-MHS-CMC
ALEXSAM, INC., <i>Plaintiff,</i> v. THE GAP, INC. AND DIRECT CONSUMER SERVICES, LLC, <i>Defendants.</i>	§ § § § § § § § § §	Case No. 2:13-cv-0004-MHS-CMC
ALEXSAM, INC. <i>Plaintiff,</i> v. J.C. PENNEY COMPANY, INC. AND J.C. PENNEY CORPORATION <i>Defendants.</i>	§ § § § § § § § § §	Case No. 2:13-cv-0005-MHS-CMC

ALEXSAM, INC.	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	Case No. 2:13-cv-0006-MHS-CMC
MCDONALD’S CORPORATION AND	§	
P2W, INC. NFP	§	
<i>Defendants.</i>	§	
	§	

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ALEXSAM, INC.,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	Case No. 2:13-cv-0007-MHS-CMC
TOYS “R” US—DELAWARE, INC. AND	§	
TRU-SVC, LLC,	§	
<i>Defendants.</i>	§	
	§	

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ALEXSAM, INC.,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	Case No. 2:13-cv-0008-MHS-CMC
HOME DEPOT USA, INC. and	§	
HOME DEPOT INCENTIVES, INC.,	§	
<i>Defendants.</i>	§	
	§	

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**DEFENDANTS’ SUPPLEMENTAL NOTICE OF SUMMARY JUDGMENT AND  
DAUBERT FILINGS RELEVANT TO INVALIDITY AND INEQUITABLE CONDUCT**

Pursuant to the Court's Order dated February 25, 2013, on February 28, 2013 the parties filed a Joint Notice of Summary Judgment and *Daubert* Filings Relevant to Invalidity and Inequitable Conduct. (*See, e.g.* 2:13-cv-2 Dkt. No. 62.) Plaintiff Alexsam, Inc. and Defendants Best Buy Stores, L.P., Barnes & Noble, Inc., Barnes & Noble Marketing Services Corp., The Gap, Inc., Direct Consumer Services, LLC, J.C. Penney Company, Inc., J. C. Penney Corporation, Inc., McDonald's Corporation, P2W, Inc. NFP, Toys "R" Us — Delaware, Inc., TRU-SVC, LLC, Home Depot USA, Inc., and Home Depot Incentives, Inc. (collectively, "Defendants") held a meet and confer on March 15, 2013, during which it became apparent to Defendants that the following *Daubert* motions are also applicable to the consolidated invalidity and enforceability trial.

- (1) Best Buy Stores, L.P.'s *Daubert* Motion to Exclude the Opinions of Plaintiff Alexsam, Inc.'s Expert Witness of Damages, James McGovern (2:13-cv-2 Dkt. No. 18).
- (2) Motion to Exclude the Opinions of James L. McGovern (filed in each of the six cases against Barnes & Noble, Inc., Barnes & Noble Marketing Services Corp., The Gap, Inc., Direct Consumer Services, LLC, J.C. Penney Company, Inc., J. C. Penney Corporation, Inc., McDonald's Corporation, P2W, Inc. NFP, Toys "R" Us — Delaware, Inc., TRU-SVC, LLC, Home Depot USA, Inc., and Home Depot Incentives, Inc.) (2:13-cv-3 Dkt. No. 20; 2:13-cv-4 Dkt. No. 21; 2:13-cv-5 Dkt. No. Dkt. No. 23; 2:13-cv-6 Dkt. No. 22; 2:13-cv-7 Dkt. No. 22; 2:13-cv-8 Dkt. No. 22).

Alexsam's witness list, exchanged on March 8, 2013, identified Mr. McGovern, its damages expert, as a witness that it will potentially call at the invalidity and enforceability trial. During the March 15 meet and confer, Defendants inquired as to the basis for Mr. McGovern's testimony, and requested that Alexsam withdraw Mr. McGovern as a potential witness for the

invalidity and enforceability trial. Alexsam refused to withdraw Mr. McGovern, explaining that it may call Mr. McGovern to testify regarding topics related to invalidity and obviousness, including the purported benefits of the claimed invention. Thus, while the Defendants also filed a Motion *in Limine* to exclude Mr. McGovern's testimony at the invalidity and enforceability trial, Defendants believe the above listed *Daubert* motions should also be considered by the Court prior to that trial. Indeed, Defendants have moved to exclude Mr. McGovern's opinions in their entirety. If such motions are granted, Mr. McGovern should be precluded from testifying at all in this case.

After Alexsam refused to withdraw Mr. McGovern, Defendants provided Alexsam with a copy of a draft of the instant notice and inquired as to whether Alexsam would consent to filing it jointly. Alexsam refused to join in the filing as drafted and indicated it disagrees with Defendants' position that the above listed motions are relevant to the invalidity and enforceability trial.

Dated: March 20, 2013

/s/ John K. Harting

Emmett J. McMahon (*pro hac vice*)

Nicole E. Kopinski (*pro hac vice*)

John K. Harting (*pro hac vice*)

ROBINS, KAPLAN, MILLER, & CIRESI LLP

2800 LaSalle Plaza

800 LaSalle Avenue

Minneapolis, MN 55402

Telephone: (612) 349-8500

Facsimile: (612) 339-4181

EJMcMahon@rkmc.com

NEKopinski@rkmc.com

JKHarting@rkmc.com

Robin L. McGrath (*pro hac vice*)

David S. Moreland (*pro hac vice*)

E Joseph Benz, III (*pro hac vice*)

PAUL HASTINGS LLP

1170 Peachtree Street, N.E., Suite 100

Atlanta, GA 30309

Telephone: (404) 815-2400

Facsimile: (404) 815-2424

robinmcgrath@paulhastings.com

davidmoreland@paulhastings.com

joebenz@paulhastings.com

Peter J. Armenio (*pro hac vice*)

Matthew D. Robson (*pro hac vice*)

Sung Hoon Kim (*pro hac vice*)

QUINN EMANUEL URQUHART & SULLIVAN,  
LLP

51 Madison Avenue, 22nd Floor

New York, NY 10010

Telephone: (212) 849-7000

Facsimile: (212) 849-7100

peterarmenio@quinnemanuel.com

matthewrobson@quinnemanuel.com

sungkim@quinnemanuel.com

Rickey L. Faulkner

Texas State Bar No. 06857095

COGHLAN CROWSON, LLP

P.O. Box 2665

Longview, TX 75606

Telephone: (903) 758-5543

Facsimile: (903) 753-6989

rfaulkner@ccfww.com

***Attorneys for Defendant Best Buy Stores, L.P.***

/s/ Roy William Sigler

Alan M. Fisch  
Jason Hoffman  
Jeffrey Saltman  
Roy William Sigler  
Fisch Hoffman Sigler LLP  
5335 Wisconsin Avenue NW, 8th Floor  
Washington, DC 20015  
Telephone: 202.362.3520  
Email: alan.fisch@fischllp.com  
Email: bill.sigler@fischllp.com  
Email: jason.hoffman@fischllp.com  
Email: jeffrey.saltman@fischllp.com

Michael Charles Smith  
Siebman Burg Phillips & Smith, LLP – Marshall  
P.O. Box 1556  
Marshall, Texas 75671-1556  
Telephone: 903.938.8900  
Facsimile: 972.767.4620  
Email: michaelsmith@siebman.com

***Counsel for Barnes & Noble, Inc., Barnes & Noble  
Marketing Services Corp., The Gap, Inc., Direct  
Consumer Services, LLC, J.C. Penney Co., Inc.,  
J.C. Penney Corp., McDonald's Corp., P2W Inc.,  
NFP, Toys "R" Us—Delaware, Inc., TRU-SVC,  
LLC, The Home Depot, U.S.A., Inc., and Home  
Depot Incentives, Inc.***

**CERTIFICATE OF SERVICE**

The undersigned certifies that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on March 20, 2013. Any other counsel of record will be served by first class mail.

/s/ John K. Harting  
John K. Harting  
*Attorney for Defendant Best Buy Stores, L.P.*